Supreme Court, U.S.
FILED
JUN 14 2005
OFFICE OF THE CLERK

No. 04-041697

In the
SUPREME COURT OF THE UNITED STATES

WILLIAM H. SORRELL, *ET AL.*,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
CONDITIONAL-CROSS-PETITIONERS,

v.

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
CONDITIONAL-CROSS-RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Conditional Cross-Petition Respondents*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc.; Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Conditional Cross-Petition Respondents*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Conditional-Cross-Petitioners*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Conditional-Cross-Petitioners.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight, Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, The Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; and Rural Vermont state that they have not issued shares to the public and no parent companies, subsidiaries, or affiliates of any of them have issued shares to the public.

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend I i,2,3,4

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28 U.S.C. §1254(1) 2

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CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

Pursuant to Supreme Court Rule 12.5, William H. Sorrell, Attorney General of the State of Vermont, *et al.*, and Vermont Public Interest Research Group, Inc., *et al.*, respectfully submit this Conditional Cross-Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. This Conditional Cross-Petition is contingent upon the Court granting a writ of *certiorari* on the issue of the constitutionality of Vermont's candidate expenditure limits, which is presented as Question One in the Petitions for Writs of *Certiorari* filed in Nos. 04-1528 and 04-1530.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is reported at 382 F.3d 91 (2nd Cir. 2004). It is reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 90a-312a. The opinion of the United States District Court for the District of Vermont is reported at 118 F. Supp. 2d 459 (D. Vt. 1999). It is reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 21a-89a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Petitions for rehearing *en banc* were denied on February 11, 2005. App. 313a-314a. The order denying rehearing *en banc* was amended on April 11 (App. 315a-344a), and again on April 18 and May 11, 2005 (filed with the Court by counsel of record in No. 04-1528). The Petition for Writ of *Certiorari* in No. 04-1528 was placed on this Court's

docket on May 16, 2005. The Petition for Writ of *Certiorari* in No. 04-1530 was placed on this Court's docket on May 17, 2005. The Conditional Cross-Petition is timely pursuant to Rule 12.5 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

1997 Vt. Laws P.A. 64, §2805a ("Act 64") (codified at 17 V.S.A. §2805a and reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 6a-7a).

STATEMENT OF THE CASE

The Court is respectfully referred to the Statement of the Case found in the Response and Partial Opposition of Respondents William H. Sorrell, *et al.*, in Nos. 04-1528 and 04-1530, which is incorporated here by reference.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The first Question Presented in the Petitions for Writs of *Certiorari* in Nos. 04-1528 and 04-1530 seeks review of the Second Circuit's ruling below, which concluded that Vermont's candidate expenditure limits, 1997 Vt. Laws P.A. 64, §2805a ("Act 64") (codified at 17 V.S.A. §2805a and reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 6a-7a), were permissible under the First Amendment and that the interests of deterring corruption and its appearance, and in protecting officials from the rigors of fundraising so that they could focus upon their duties, were sufficiently compelling to justify such limits.

In response to those Petitions, Respondents William H. Sorrell, *et al.* and Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.*, agreed that there is a division among the Circuits as to the constitutionality of expenditure limits and argued that the Second Circuit had correctly upheld such limits in light of this Court's precedents. Respondents and Respondent-Intervenors further asserted that additional compelling interests, different constitutional analyses, and alternative narrow tailoring analyses not examined by the Second Circuit also supported the ruling below. Respondents and Respondent-Intervenors concluded, however, that review by this Court at this time is

necessary and appropriate to resolve the split among the Courts of Appeals and to bring clarity to this recurring issue of national importance.

In the event the Court issues a writ of *certiorari* as to Question One in either No. 04-1528 or No. 04-1530, it should also grant this Conditional Cross-Petition. Conditional Cross-Petitioners state that there are additional compelling interests, different constitutional analyses (including reconsideration of the standards set out in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)), and alternative narrow tailoring analyses that the Court could choose to employ in evaluating expenditure limitations under the First Amendment. These arguments are more fully set out in the Response and Partial Opposition of Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.*, in Nos. 04-1528 & 04-1530 (the "Partial Opposition"), at Section I(C)(3), which is incorporated here by reference.

Cross-Petitioners believe that the above-referenced arguments will properly be before the Court upon a grant of review as to Question One set forth in the Petitions in Nos. 04-1528 or 04-1530, because these arguments provide alternative grounds for upholding the judgment of the Second Circuit. Nevertheless, they have filed this Conditional Cross-Petition to assure that the Court can give full examination to all constitutional justifications for candidate spending ceilings and can afford relief in excess of that granted by the Second Circuit.

In light of the fact that the Court has not considered candidate expenditure limits in over 30 years, that a number of Justices of this Court have expressed concerns over the constitutional standards enunciated in *Buckley* regarding such limits, *see* Partial Opposition at Section I(B) n.5, and that the propriety of spending limits is an

issue of great public concern, the Court should grant this Conditional Cross-Petition to allow complete and thorough consideration of this issue.

CONCLUSION

If the Petition for Writ of *Certiorari* in either No. 04-1528 or No. 04-1530 is granted as to Question One, this Conditional Cross-Petition also should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

(29) (28) (17)

Nos. 04-1528, 04-1530, 04-1697

In the Supreme Court of the United States

NEIL RANDALL, ET AL.,

v.

WILLIAM H. SORRELL, ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL.,

v.

WILLIAM SORRELL, ET AL.

WILLIAM H. SORRELL, ET AL., AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, ET AL.,

v.

NEIL RANDALL, ET AL., AND VERMONT REPUBLICAN
STATE COMMITTEE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Joint Appendix

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Petitions for Writ of Certiorari Filed: May 11, 2005 (04-1528), May 12, 2005 (04-1530), June 14, 2005 (04-1697)
Certiorari Granted: September 27, 2005

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

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District Court Opinion (8/10/2000)	21a
Court of Appeals Amended Opinion (8/18/2004)	90a
Denial of Petition for Rehearing En Banc (2/11/2005)	313a
Second Amended Denial of Petition for Rehearing En Banc; Concurring and Dissenting Opinions (4/11/05)	315a

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[1]The opinions of Judges Calabresi and Raggi were filed on May 11, 2005; thus, they were not included with the other Denial of Rehearing opinions printed in the Appendix to the Petition for Certiorari at 315a.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Docket Nos. 2:99-cv-146, 2:99-cv-234, 2:00-cv-57

MARCELLA LANDELL, et al., *Plaintiffs,*
NEIL RANDALL, et al., *Plaintiffs,* and
VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants* and
VERMONT PUBLIC INTEREST RESEARCH GROUP,
et al., *Defendants-Intervenors*

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/1999	---	ENDORSED ORDER: granting [28-1] motion to Consolidate Cases (2:99-cv-146 & 2:99-cv-234), consolidated lead case (Judge William K. Sessions III) Cy to parties (pjd) (Entered: 10/22/1999)
03/21/2000	84	ORDER consolidating case with 2:00-CV-57 (copy of original P#28 in 2:00-CV-57), consolidated lead case (Judge William K. Sessions III)

DATE	DOCKET NUMBER	PROCEEDINGS
		[EOD Date 3/21/00] Cy to parties (pjd) (Entered: 03/21/2000)
04/07/2000	---	MINUTE ENTRY: by Judge William K. Sessions III ***** ORDERED: cases remain consolidated, however; court trial will go forward on 5/8 through 5/17 with fact witnesses only; court trial will continue on 5/31 & 6/1 with expert witnesses *****
08/10/2000	130	OPINION AND ORDER 1) Act 64's contribution limits to candidates are constitutional; 2) Act 64's expenditure limits are unconstitutional; 3) Act 64's 25% limit on out-of-state funds is unconstitutional; 4) Act 64's $2000 limit on contributions to political parties is constitutional; 5) Act 64's $2000 limit on contributions to political committees and its various limits on contributions by political committees to candidates is constitutional; 6) Act 64's regulation of related expenditures is

DATE	DOCKET NUMBER	PROCEEDINGS
		constitutional as it relates to candidate contributions but unconstitutional as it relates to candidate expenditures; 7) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned within this order against pltfs (Judge William K. Sessions III) Cy to parties (law) Modified on 08/14/2000 (Entered: 08/10/2000)
08/10/2000	131	**VACATED - SEE P#168** JUDGMENT (Judge William K. Sessions III) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned against pltfs case closed Cy to parties (law) Modified on 08/14/2000 Modified on 2/24/2005 (jse). (Entered: 08/10/2000)
09/11/2000	136	NOTICE OF APPEAL by intervenors-defendants VT Public Int Rsrch, League Women Voters, Rural Vermont, Vt OWL, Vt Alliance Consv, Mike Fiorillo, Marion Grey, Phil Hoff, Frank

DATE	DOCKET NUMBER	PROCEEDINGS
		Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, Maria Thompson re: [131-1] judgment. *****
09/11/2000	138	NOTICE OF APPEAL by defendants William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand re: [131-1] judgment *****
09/22/2000	146	NOTICE OF CROSS-APPEAL by plaintiffs Donald R. Brunelle, VRLC-PC, VRLC-FIPE re: [131-1] judgment *****
09/22/2000	147	NOTICE OF CROSS-APPEAL by plaintiff VT Republican Comm re: [131-1] judgment. *****

DATE	DOCKET NUMBER	PROCEEDINGS
09/25/2000	148	NOTICE OF CROSS-APPEAL by plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, Vt Libertarian Party re: [131-1] judgment. *****
02/22/2005	168	MANDATE of USCA re: judgment of district court is AFFIRMED in part, VACATED in part, and REMANDED for further proceedings in accordance with the opinion of this Court. (Opinion not scanned; available for viewing at the Burlington Clerk's Office) Each party shall bear its own costs on this appeal. RE: [148] Notice of Appeal filed by Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, The Vermont Libertarian Party; [147] Notice of Appeal filed by Vermont Republican State Committee; [138] Notice of Appeal filed by Vincent Illuzzi, William Wright, William H. Sorrell, John T. Quinn, Dale O. Gray,

DATE	DOCKET NUMBER	PROCEEDINGS
		Lauren Bowerman, James Hughes, Joel W. Page, James D. McNight, James P. Mongeon, Terry Trono, Dan Davis, George E. Rice, Keith W. Flynn, Robert L. Sand; [136] Notice of Appeal filed by Vermont Public Interest Research Group, Cheryl Rivers, Rural Vermont, League of Women Voters of Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Maria Thompson; [146] Notice of Appeal filed by Donald R. Brunelle, Vermont Right to Life Committee--Political Committee, Vermont Right to Life Committee--Fund for Independent Political Expenditures. (cwb) (Entered: 02/22/2005)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-9159 (Lead), 00-9180 (con), 00-9231 (xap), 00-9239 (xap), and 00-9240 (xap)

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUSSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

V.

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL

VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	*****
5/7/01	Case heard before WINTER, STRAUB, POOLER C.JJ. (TAPE: #207) [DT]
	*****
8/7/02	Judgment of the district court is Affirmed in part, Vacated in part and Remanded by published signed opinion filed. (CJS) [00-9159, 00-9180, 00-9231, 00-9239, 00-9240] [DT]
8/7/02	Notice to counsel re: Opinion filed. [DT]
8/7/02	Judgment filed. [Entry Date: 8/7/02] [DT]
8/7/02	Judge RKW DISSENTING in a separate opinion filed. [DT]
	*****
10/3/02	Order filed stating re: An opinion and judgment having been filed on August 7, 2002, IT IS ORDERED that the opinion and judgment

DATE	PROCEEDINGS
	are hereby withdrawn, pending further proceedings before and amendment by the panel. As jurisdiction is retained by the panel, the mandate will not issue until further order. Before: RKW, CJS, RSP, C.JJ. (LC) [DT]
	*****
8/18/04	Judgment of the district court is Affirmed in part, vacated in part, and remanded for further proceedings by published signed opinion filed. (CJS) [EA]
8/18/04	Judge Winter dissents in a separate opinion, filed. [EA]
8/18/04	Judgment filed. [EA]
	*****
2/11/05	Order filed stating: A poll on in banc rehearing was conducted among the active judges of the court, a majority of whom voted to deny rehearing in banc. Judges of the court expect to file opinions in due course. (LC) [EA]
	*****
4/11/05	Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing in banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case in banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc was DENIED by order of the